No. 15442

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant,

vs.

VERDA A. GOREY,

Appellee.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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Appellee respectfully moves the Court for a rehearing of this case for the following reasons.

Trial Court Was Right in Refusing to Direct the Verdict.

The Trial Court was correct in refusing to direct a verdict in favor of the defendant. A motion for a directed verdict for a defendant should be granted only when, disregarding conflicting evidence, and giving to the plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is not sufficient substantiality to support a

plaintiff's verdict. A motion for a defendant should be granted only when there is a complete defense by uncontradicted evidence.

> *Ritchie v. Long Beach Community Hospital Association,* 139 Cal. App. 688, 34 P. 2d 771;
>
> *Sokolow v. City of Hope,* 41 Cal. 2d 668, 262 P. 2d 841.

In the recent California case of *Negvesky v. Alston* reported in 312 P. 2d 728, the insurance company sought to rescind a policy of insurance upon the ground the evidence showed *conclusively* the policy was secured through fraud and misrepresentation. The trier of the facts found against the insurance company, and it appealed. The Court in its opinion stated:

> "But this was a question of fact for the trial court to determine. It needs no citation of authority to support the fundamental rule of California law that if there is any substantial evidence in the record to support the trial court's finding contrary to the insurance company's contention, it is not within the power of this reviewing court to disturb it."

And again,

> "While it is of course true that contrary deductions could have been made from the evidence, such deductions under our law are for the determination of the trier of the facts. This court's power and function ends when it finds any substantial evidence in the record that will support a finding by the trial court. Primm v. Primm, 46 Cal. 2d 690, 693, 299 P. 2d 231."

There Was an Issue of Fact.

Question 54 was, "Have you ever had any ailment or disease of Heart or lungs"? The answer given was "no." In answering the question, all that was required of the applicant was that he give an honest answer. It is not required by law or by the terms of the policy that he give a warranty as to the correctness of his answer. Appellee concedes there was evidence applicant had a heart disease or ailment, but it is contended there was evidence also to the contrary in (1) Dr. Groff's examination and (2) the evidence that he worked at a strenuous trade every day until the date of death. If he did not *in fact* have a heart disease or ailment, the question was answered corrected regardless of whether he had consulted with Dr. Kerchner and regardless of Dr. Kerchner's opinion. There was also a lack of evidence in that no autopsy was performed. The question asked was not whether he had ever had a diagnosis of heart disease made by a doctor, but rather had he in fact ever had a heart disease or ailment. It was properly a question for the trier of the facts.

The court's opinion appears to rest upon the decision made by the California Supreme Court in the case of *Cohen v. Penn Mutual Life Insurance Company,* 48 Cal. 2d 720, 312 P. 2d 241. That decision was made by a 4 to 3 vote of the Court with a very strong dissenting opinion. While the case is as much the law of California as though the Court had unanimously reversed, yet it demonstrates that had the facts of the case been a little less compelling than they were, the case would not have been reversed. In the majority opinion great stress is laid on the fact that the deceased was a doctor, and the

case is bottomed on such fact. But this Court says at page 7 of its opinion, "but he knew that he had pain in the region of the heart, that his heart had been examined, that he had been given medicine for pain in or about the heart." Answering each part of the quoted portion of the opinion, (1) The evidence showed that on one day in this man's life he had pain in the region of his heart. He consulted the doctor on two occasions thereafter at the doctor's request for the purpose of making tests. It is not known whether he still had the pain on the latter visit or not. In any event, a pain in the region of his heart does not necessarily indicate a heart disease; (2) it is true he knew his heart had been examined, but that fact does not mean he knew he had heart disease; (3) it is true he had been given a prescription for medicine for pain in or about the heart, but the evidence indicates he was not seriously enough impressed with a heart disease to have the prescription filled [R. 104].

In the *Cohen* case the Court says: "Here the deceased was himself a doctor, he knew his medical history in regard to his heart condition. . . ." But in this case he was not a doctor, and his consulting physician minimized a patient's heart condition in making a report to the patient. "Sometimes we can't even tell them" [R. 60]. Further the doctor's office records indicate the deceased may not have recognized his true condition.

In the *Cohen* case the applicant was asked several specific questions concerning medical treatment and diagnosis, while in this case there is only a general question—do you have a disease or ailment of the heart—clearly calling for the applicant's opinion.

The Court in its opinion cites the case of *California Western States Life Insurance Company v. Feinstein,* 15 Cal. 2d 413, 101 P. 2d 696. In an application for reinstatement the insured stated in this case that he had no "injury, deformity or symptoms of sickness" nor had he "consulted a physician for any ailments since said policy of insurance was issued." The application was made on December 30, 1935. It was shown by uncontradicted evidence at the trial that the insured had consulted Dr. Swezey on 26 occasions, the last of which was on October 16, 1935 in addition to consulting another doctor. The trial court found for the insurance company. On appeal the California Supreme Court said, page 419:

> "Under those circumstances, it is a well established rule that on a review of the evidence, together with the inferences which could have been drawn therefrom, the conclusion to be reached was solely for the trial court, who saw the witnesses and heard them testify, and that the findings made thereon by the trial court may not be disturbed."

Had the trial court's findings been in favor of the insured in this case, the California court would not have disturbed the findings, and a recovery could have been had by the insured regardless of the visits to the doctor. It was a question of fact for the trial court, not a question of law.

The Instructions on Opinion Evidence.

The Court says the instruction on opinion evidence was error. Dr. Kerchner testified not only as to facts as stated by the Court but also gave his opinion as to the deceased heart condition. The doctor's opinion together with the opinion of Dr. Travis Windsor was the only

evidence the appellant had to prove the falsity (if it was false) of question 54. It was essential to the appellant's case, that it prove a heart disease. This proof was made through the doctor's opinion.

Conclusion.

There was a question of fact in this case properly submitted to the jury which this Court should not have resolved into a question of law.

Respectfully submitted,

L. E. McManus,

Attorney for Appellee.

Certificate of Counsel.

I, L. E. McManus, counsel for Petitioner, in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

L. E. McManus,

Attorney for Petitioner.